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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

September 5, 2017

To:

Hon. Jeffrey A. Conen
Circuit Court Judge
Safety Building
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Dennis Schertz
Schertz Law Office
P.O. Box 133
Hudson, WI 54016

Eduardo Luis Alvarado 527787
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2016AP2518-CRNM State of Wisconsin v. Eduardo Luis Alvarado (L.C. # 2015CF3685)

Before Brennan, P.J., Kessler and Brash, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Eduardo Luis Alvarado entered a guilty plea to one count of first-degree sexual assault of a person who had not achieved the age of sixteen years. *See* WIS. STAT. § 948.02(1)(d) (2015-16).[1] The circuit court imposed a twenty-three-year term of imprisonment, bifurcated as fifteen

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

years of initial confinement and eight years of extended supervision, and the circuit court ordered that the sentence be served consecutively to any sentence Alvarado was already serving.[2] Alvarado appeals.

Appellate counsel, Attorney Dennis Schertz, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Alvarado did not file a response.[3] Upon our review of the no-merit report and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State filed a criminal complaint alleging that on August 13, 2015, Alvarado's fourteen-year-old nephew was in Alvarado's home in Milwaukee, Wisconsin, when Alvarado forced the boy into a bedroom and anally penetrated him over a period of approximately ten minutes. Subsequent forensic testing revealed the presence of Alvarado's DNA on the waistband of the boy's underwear. The State charged Alvarado with one count of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1)(d). Alvarado decided to resolve the charge with a plea bargain.

We first examine whether Alvarado could raise an arguably meritorious claim that he was not competent to proceed in the circuit court. "[A] defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d

[2] The Honorable M. Joseph Donald accepted Alvarado's guilty plea. The Honorable Jeffrey A. Conen imposed sentence and entered the judgment of conviction.

[3] The record shows that Alvarado is a Spanish-language speaker who required the assistance of an interpreter in circuit court. Attorney Schertz advised this court that he served Alvarado with a Spanish-language version of the no-merit report.

197, 614 N.W.2d 477. The circuit court referred Alvarado for a competency examination on the date set for his guilty plea after trial counsel advised the court that Alvarado had difficulty speaking as a result of a brain injury. The examining psychiatrist filed a report stating that Alvarado suffers from "an expressive aphasia caused by a hemorrhagic stroke.... The stroke affected the Broca's area of the brain responsible for speech production." The psychiatrist determined, however, that "[t]he areas of the brain involved in understanding speech have not been affected," and that "Alvarado demonstrated the substantial mental capacity to understand legal proceedings and assist in his defense." The psychiatrist concluded that Alvarado was competent to proceed. Neither the State nor Alvarado challenged the psychiatrist's conclusions, and the circuit court found that he was competent to proceed.

This court will uphold a circuit court's competency determination unless that determination is clearly erroneous. *See* ***State v. Garfoot***, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997). In light of the psychiatrist's report and the standard of review, any further proceedings in regard to Alvarado's competency would lack arguable merit.

We next consider whether Alvarado could pursue an arguably meritorious challenge to his guilty plea. At the start of the plea proceeding, the State described the terms of the parties' plea bargain. Alvarado would plead guilty as charged, and in exchange, the State would recommend fifteen years of initial confinement and eight years of extended supervision. Alvarado agreed that the State correctly recited the terms of the parties' agreement.

The circuit court warned Alvarado that if he was not a citizen of the United States, his guilty plea exposed him to the risks of deportation, exclusion from admission to this country, and denial of naturalization. *See* WIS. STAT. § 971.08(1)(c). Alvarado said he understood. Although the circuit court did not caution Alvarado about the risks described in § 971.08(1)(c) using the

precise words required by the statute, the deviations were minor, and minor deviations from the statutory language do not undermine the validity of a plea. *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

"[A] circuit court must establish that a defendant understands every element of the charge[] to which he pleads." ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court reviewed the elements of the crime on the record. Alvarado said that he understood the elements.

The record contains a signed plea questionnaire and waiver of rights form with attachments. Alvarado told the circuit court that he understood the documents after reviewing them with his trial counsel and with the assistance of a Spanish-language translator. The plea questionnaire reflects that Alvarado was fifty-five years old and had completed six years of schooling. The questionnaire further reflects that he understood the charge he faced, the rights he waived by pleading guilty, the maximum penalty for the crime, and the minimum term of confinement that would be imposed. A signed addendum to the form reflects Alvarado's acknowledgment that by pleading guilty he would give up his rights to raise defenses, to challenge the sufficiency of the complaint, and to seek suppression of evidence.

The circuit court told Alvarado that by pleading guilty he would give up the constitutional rights listed on the plea questionnaire, and the circuit court reviewed those rights on the record. Alvarado said he understood. The circuit court further explained that by pleading guilty, Alvarado would give up his available defenses to the charge. Alvarado again said he understood.

The circuit court explained to Alvarado that, upon conviction, he faced sixty years of imprisonment. *See* WIS. STAT. §§ 948.02(1)(d) and 939.50(3)(b). The circuit court told Alvarado it was free to impose the maximum statutory penalty and that the circuit court was not bound by the terms of the plea bargain or by any sentencing recommendations. Alvarado said he understood. He assured the circuit court that he had not been promised anything to induce his guilty plea and that he had not been threatened.

Defendants are entitled to know when they face presumptive or mandatory minimum sentences upon conviction. *See* ***State v. Mohr***, 201 Wis. 2d 693, 700-01, 549 N.W.2d 497 (Ct. App. 1996). In this case, the plea colloquy did not include a discussion of the mandatory minimum sentence Alvarado faced pursuant to WIS. STAT. § 939.616(2)-(3). We have therefore considered whether Alvarado could pursue an arguably meritorious challenge to his guilty plea based on an alleged defect in the plea hearing. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). We conclude he could not. A ***Bangert*** motion must demonstrate both that: (1) the plea colloquy did not conform with WIS. STAT. § 971.08 or other duties mandated during a plea hearing; and (2) the defendant did not know or understand the information that should have been provided at the hearing. ***State v. Brown***, 2006 WI 100, ¶2, 293 Wis. 2d 594, 716 N.W.2d 906. The record conclusively shows that Alvarado could not satisfy both prongs of such a motion.

First, the plea questionnaire correctly stated that Alvarado faced a mandatory minimum term of five years of initial confinement. *Cf.* ***Mohr***, 210 Wis. 2d at 701 & n.1 (indicating that the contents of the plea questionnaire may demonstrate that the defendant has received the necessary information about any presumptive or mandatory sentences). Second, the circuit court established during the plea colloquy that Alvarado had reviewed a Spanish-language translation

of the complaint with his trial counsel and that he understood it. The complaint contains an advisement that Alvarado faced a minimum of five years of confinement upon conviction. Third, a successor judge presided in this matter after the plea colloquy concluded, and the successor judge decided not to proceed with sentencing until the successor judge personally confirmed Alvarado's understanding of the penalties he faced. The successor judge therefore did not start the sentencing proceeding until after the judge had engaged Alvarado in a supplemental colloquy. Among the supplemental questions the judge posed to Alvarado was whether he understood that he faced "a mandatory, minimum five years of initial confinement time." Alvarado said he understood. Accordingly, a challenge to the guilty plea based on a claim that Alvarado did not understand the mandatory minimum penalty he faced would lack arguable merit. *See* ***State v. Taylor***, 2013 WI 34, ¶39, 347 Wis. 2d 30, 829 N.W.2d 482 (reflecting that a defect in the circuit court's description of the statutory criminal penalty during a plea colloquy is insubstantial and does not raise a question about the validity of the plea when the record shows the defendant knew and understood the penalty).

A plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crime charged. *See* WIS. STAT. § 971.08(1)(b). Alvarado told the circuit court that the facts alleged in the criminal complaint were true and that he was pleading guilty to the crime charged because he committed it. The circuit court properly found a factual basis for the guilty plea. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363.

The record discloses that Alvarado entered his guilty plea knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08, ***Taylor***, 347 Wis. 2d 30, ¶39, and ***Bangert***, 131 Wis. 2d at 266-72, *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (stating

that a plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The record reflects no basis for an arguably meritorious challenge to the validity of the plea.

We next consider whether Alvarado could pursue an arguably meritorious challenge to his sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id***. The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court indicated that protection of the community was the sentencing goal, and the circuit court discussed the factors it deemed relevant to that goal.

The circuit court described the offense as "extremely disturbing" and viewed it as aggravated by the violence and suddenness of the conduct. The circuit court considered Alvarado's character, acknowledging that Alvarado had accepted responsibility for his actions and that he had a significant brain injury limiting his ability to communicate. The circuit court also took into account, however, that Alvarado had three prior criminal convictions, all arising after he arrived in Wisconsin in 2000.[4] *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (criminal record is evidence of character). Further, one of Alvarado's convictions was for fourth-degree sexual assault, and the circuit court concluded that Alvarado's criminal impulses were escalating as he aged. The circuit court found that the mandatory minimum sentence was insufficient to protect the public and that the minimum term of imprisonment necessary was fifteen years of initial confinement and eight years of extended supervision.

The circuit court identified the factors that it considered in fashioning Alvarado's sentence. The factors are proper and relevant. Moreover, the sentence is not unduly harsh. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Here, the penalty imposed is far less than the law allows. "'[A] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public

[4] The circuit court took a short recess during the sentencing proceedings to permit the parties to determine whether Alvarado had a criminal record in his native Puerto Rico. The State thereafter advised that it had nothing to show that Alvarado had any criminal convictions outside of Wisconsin.

sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Id.*** (citation omitted). Accordingly, Alvarado's sentence is not unduly harsh or excessive. We conclude that a further challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

Finally, appellate counsel advises that Alvarado has no basis for a claim of ineffective assistance of trial counsel. We agree that nothing in the record indicates that such a claim would be arguably meritorious.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Eduardo Luis Alvarado on appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals